

The *Thompson* Advice Letter No. A-06-061 is RESCINDED, as it conflicts with this letter's conclusions.

October 31, 2011

Richard R. Rios
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Re: Your Request for Advice
Our File No. A-11-181

Dear Mr. Rios:

This letter responds to your request for advice regarding campaign disclosure provisions of the Political Reform Act (the "Act").¹

This letter should not be construed as advice on any conduct that may have already taken place. Additionally, this letter is based on the facts presented. The Fair Political Practices Commission ("Commission") does not act as a finder of fact when it renders assistance. *In re Oglesby* (1975) 1 FPPC Ops. 71; Section 83114.)

QUESTION

Is an Internet website subject to disclosure requirements of the Act contained in Section 84506(a)(1) and (2) if the website is an independent expenditure paid for by a primarily formed or general purpose committee supporting or opposing a candidate for public office?

CONCLUSION

Yes. A plain reading of Section 84506, coupled with the Commission's amendments to Regulations 18450.1, 18450.4 and 18450.5 relating to electronic advertising disclosures, requires

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

application of the disclaimer requirements to Internet websites that constitute independent expenditures paid for by a primarily formed or general purpose committee supporting or opposing a candidate for office.

FACTS

Your law firm represents numerous political committees engaged in independent expenditure activities. Your clients frequently sponsor Internet websites that constitute independent expenditures supporting or opposing candidates for office. You note that in the past, the Commission has defined “broadcast” only to include radio or television transmissions. (*Thompson Advice Letter*, A-06-061).

You request formal written advice² and wish to know if an Internet website is subject to disclosure requirements of the Act contained in Section 84506(a)(1) and (2) if the website is an independent expenditure paid for by a primarily formed or general purpose committee supporting or opposing a candidate for public office.

ANALYSIS

The Act contains certain disclosure requirements for committees to identify themselves on broadcast advertisements paid for by independent expenditures. Many of these requirements were amended in 2010, after the Commission issued its subcommittee report on Internet Political Activity. The following is a brief summary of the subcommittee and its findings relative to electronic media advertisements that are pertinent to your question.

Subcommittee on Internet Political Activity:

In October 2009, the Fair Political Practices Commission created a Subcommittee on Internet Political Activity and named Commissioners Elizabeth Garrett and Timothy A. Hodson, as its members. The Subcommittee’s charge was to continue and build on the work of the Bipartisan California Commission on Internet Political Practices, in particular, on the Bipartisan Commission’s December 2003 Report, which explored the role of electronic communication in California political campaigns.

The Subcommittee held two hearings (that included more than a dozen campaign consultants, Internet experts, public interest advocates, representatives of the Federal Election Commission and others) and extensive research was conducted by Commission staff. In August 2010, the subcommittee issued its report on Internet Political Activity and the Political Reform Act, making specific findings that led to many of the Commission’s November 2010 amendments relating to electronic media advertisements.

² Your letter of September 22, 2011 stated that you are requesting “an opinion pursuant to Government Code section 83114(a) concerning [your] clients’ obligation to comply with disclosure requirements” of the Act. In our phone call of October 19, 2011, you stated that you had intended to request formal written advice, not an opinion.

The subcommittee identified four areas of focus:

- *Full and truthful disclosure of campaign activity, including Internet activity, by candidates and political committees*, is required to ensure the integrity of democratic institutions and the electoral process.
- If regulations require disclosure with respect to paid political communications that are printed or broadcast, then *similar paid communications that are disseminated over the Internet should be accompanied by similar disclosures*.
- The Commission should avoid regulating volunteer, grassroots political activity and ensure to the extent possible that the Internet remains a flourishing source of robust and vibrant political discourse among citizens.
- The Commission should *broadly interpret the words of the Political Reform Act to allow regulation consistent with these principles and the objectives of the PRA*. Legislative change should be written to allow flexibility in future regulatory responses to the use of technology that is evolving rapidly and in unanticipated ways.

(From the FPPC Subcommittee Report on Internet Political Activity, August 11, 2010, emphasis added.)

The subcommittee report stated, “When a committee or candidate engages in campaigning, the public should know that the communication is being paid for regardless of the form that communication takes The PRA does *not* focus on the method of communication (e.g., a print advertisement or an “electronic” advertisement on a website). Rather, the PRA focuses on the fact that a committee or candidate is paying for the communication.” (Emphasis added.)

The report concluded that “If the PRA and regulations require disclosure on paid political communications that are printed or broadcast, then similar paid communications that are disseminated over the Internet should be accompanied by similar disclosures.”

After the Subcommittee issued its report, the Commission began updating and amending the Act’s advertising disclosure requirements to reflect the subcommittee findings.

The Act’s amended advertising disclosure requirements:

The Act contains certain disclosure requirements for committees to identify themselves on broadcast advertisements paid for by independent expenditures.

Section 84501 defines “advertisement” under the Act as “any general or public advertisement which is authorized and paid for by a person or committee for the purpose of supporting or opposing a candidate for elective office or a ballot measure or ballot measures.”

Section 84506 provides:

“(a) A broadcast or mass mailing advertisement supporting or opposing a candidate or ballot measure, that is paid for by an independent expenditure, shall include a disclosure statement that identifies both of the following:

“(1) The name of the committee making the independent expenditure.

“(2) The names of the persons from whom the committee making the independent expenditure has received its two highest cumulative contributions of fifty thousand dollars (\$50,000) or more during the 12-month period prior to the expenditure. If the committee can show, on the basis that contributions are spent in the order they are received, that contributions received from the two highest contributors have been used for expenditures unrelated to the candidate or ballot measure featured in the communication, the committee shall disclose the contributors making the next largest cumulative contributions of fifty thousand dollars (\$ 50,000) or more.”

The Commission’s November 2010 amendments extend the Act’s advertising disclosure requirements to include electronic communications. The changes updated the definition of advertisement in Regulation 18450.1 to include “electronic media advertisements,” as recommended by the subcommittee report. The Commission also defined “electronic media advertisement” as “an advertisement, logo, icon, writing, image, recording, or other data transmitted, distributed, posted, broadcast, or displayed electronically. This includes, but is not limited to advertisements in electronic messages, electronic message attachments, text messages, or advertisements that appear on Internet web pages, blogs, mobile devices, or other electronic communication systems.” In addition, the amendment applies the requirements of advertising disclosure statements under Regulation 18450.4 to “electronic media advertisements.”

Regulation 18450.1(a)(1)-(a)(2) states that:

“Advertisement,” for purposes of these provisions, means any general or public advertisement which is authorized and paid for by a person or committee for the purpose of supporting or opposing a candidate for elective office or a ballot measure or ballot measures and includes a communication placed in “television or radio” or “a communication . . . that is placed in broadcast, print, or *electronic media*.” (Emphasis added.)

Amended Regulation 18450.1(a)(2)(A) provides in pertinent part:

“(A) An electronic media advertisement means an advertisement, logo, icon, writing, image, recording, or other data transmitted, distributed, posted, broadcast, or displayed electronically. This includes, but is not limited to advertisements in electronic messages, electronic message attachments, text messages, or advertisements that appear on Internet webpages, blogs, mobile devices, or other electronic communication systems.”

Regulation 18450.4 provides in pertinent part:

“(a) The disclosure requirements of Sections 84503 and 84506(a)(2) shall not apply to general purpose committees, as defined by Section 82027.5.

“(b) Where a “disclosure statement” or “disclosure” is required for an advertisement under Sections 84503, 84504, 84506, or 84506.5, the following shall apply to the committee that authorized and paid for the advertisement:

“(1) Disclosures shall include “paid for by” in the same manner as, and immediately adjacent to and above, or immediately adjacent to and in front of, the required identification. In addition, disclosure required by Sections 84503 and 84506 shall include the name, pursuant to Regulation 18450.3, of the \$50,000 contributor or contributors. The disclosure shall explicitly indicate that the contributor or contributors were major donors to the committee by stating, for example, “major funding by” “committee contributors:” or “top contributors:” In the case of a contributor that is a committee pursuant to Section 82013(a), the word “committee” shall be included in the disclosure. The aggregation rules of Regulation 18215.1 shall apply in determining when a contributor has reached the \$50,000 disclosure threshold of Sections 84503 and 84506.”

(***)

“(b)(3)The disclosures required by Sections 84503, 84504, 84506, and 84506.5 shall be presented in a clear and conspicuous manner to give the reader, observer or listener adequate notice of the identity of the person(s) or committee(s) that paid for the communication.”

You ask whether an Internet website is subject to disclosure requirements of the Act contained in Section 84506(a)(1) and (2) if the website is an independent expenditure paid for by a primarily formed or general purpose committee supporting or opposing a candidate for public office. You also cite the *Thompson* Advice Letter, A-06-061,³ which stated that “broadcasts” are “commonly defined as radio or television transmissions . . .”

Since the *Thompson* Advice Letter was issued in 2006, there have been a series of amendments to the Commission’s regulations clarifying Section 84506 as it pertains to your question. Therefore, we analyze your question pertaining to application of the disclosure requirements in Section 84506 as a new question under the amended regulations.

Pursuant to Section 83112, the Commission may adopt, amend, and rescind rules and regulations to carry out its purposes. Therefore, the Commission has continuing discretion to interpret the term “broadcast” in Section 84506 for purposes of implementing the Act.

³ To the extent that our prior advice contained in the *Thompson* Advice Letter conflicts with this letter’s conclusions, it is rescinded.

As noted above, the Commission, through its subcommittee findings and regulatory amendments, revised its advertising regulations in November 2010 to specifically impose disclaimers on all Internet advertising, unless disclosure was impossible or impracticable.

In amending its advertising disclosure regulations, the Commission made it clear that ads that appear on Internet web pages, blogs, mobile devices and the like must now identify funding sources or identify that the ad was prepared independently of a candidate.

Clearly the Commission did not intend to exempt Internet websites from these new disclosure rules, as such an interpretation would produce absurd or impracticable consequences. For instance, under this interpretation, the new disclosure rules would apply to political button ads on Internet web pages, while allowing entire Internet websites paid for by independent expenditures to have absolutely no disclosure requirement.

With the Commission's recent regulatory amendments in mind, and with the Internet subcommittee's charge to "broadly interpret the words of the Political Reform Act," we interpret the provisions of the Act to best further its purposes. (Section 81003.)

Therefore, we find that the plain meaning of "broadcast" in Section 84506 as interpreted by the Commission regulations includes Internet websites. (See also more recent court decisions incorporating Internet technology into a broader definition for the term "broadcast;" *United States v. Shelhurst*, 2009 U.S. Dist. LEXIS 101427 (M.D. Ga. Nov. 2, 2009), defining "broadcast" as "casting or scattering in all directions" and "the act of making widely known;" referencing Webster's Third New International Dictionary (Unabridged) 280 (1993).); see also *Sportvision, Inc. v. Sports MEDIA Tech. Corp.*, Civ. No. 04-03115, 2006 U.S. Dist. LEXIS 8995, 12 (N.D. Cal., Feb. 17, 2006) (defining "broadcast" as "a wide-spread distribution"); *Televisa, S.A. de C.V. v. Univision Communs., Inc.*, 2009 U.S. Dist. LEXIS 61184 (C.D. Cal. July 17, 2009) where "broadcast" is defined expansively to mean "all electronic forms or other means now known or hereafter developed of transmission and retransmission . . . The Internet is a 'means . . . of transmission and retransmission.' The broad definition of 'broadcast' encompasses transmission over the Internet.")

Therefore, we find that a plain reading of Section 84506, as along with the Commission's November 2010 amendments to Regulations 18501.1 (Definitions Advertisement Disclosure), 18450.4 (Contents of Disclosure Statements, Advertisement Disclosure), and 18450.5 (Amended Advertising Disclosure), require application of the disclaimer rules to Internet websites that are independent expenditures paid for by a primarily formed or general purpose committee to support or oppose a candidate for office.

Specific Disclosure Requirements for General Purpose and Primarily Formed Committees:

There are, however, differences in disclosure requirements for general purpose versus primarily formed committees, as stated in Regulation 18450.4(a) and (b).

A general purpose committee that makes an independent expenditure through an Internet website advertisement supporting or opposing a candidate for office must at the very minimum identify the name of the committee making the independent expenditure. (Section 84506; Regulation 18450.4 (b)(1).)

The disclaimer must be “presented in a clear and conspicuous manner” to give the reader, observer or listener adequate notice of the identity of the person(s) or committee(s) that paid for the communication . . .” Please note that “a disclaimer is not clear and conspicuous if it is difficult to read or hear, or if the placement is easily overlooked.” (Regulation 18450.4(b)(3)(G).)

A primarily formed committee that makes an independent expenditure through an Internet website advertisement supporting or opposing a candidate for office must identify both of the following: (1) The name of the committee making the expenditure; and (2) The names of the persons from whom the committee making the independent expenditure has received its two highest cumulative contributions of fifty thousand dollars (\$50,000) or more during the 12-month period prior to the expenditure. (Section 84506.)

In addition, the primarily formed committee making the independent expenditure shall include “paid for by” in the same manner as, and immediately adjacent to and above, or immediately adjacent to and in front of, the required identification. In addition, disclosure required by Sections 84503 and 84506 shall include the name, pursuant to Regulation 18450.3, of the \$50,000 contributor or contributors. The disclosure shall explicitly indicate that the contributor or contributors were major donors to the committee by stating, for example, “major funding by” “committee contributors:” or “top contributors:”. In the case of a contributor that is a committee pursuant to Section 82013(a), the word “committee” shall be included in the disclosure. The aggregation rules of Regulation 18215.1 apply in determining when a contributor has reached the \$50,000 disclosure threshold of Sections 84503 and 84506. (Regulation 18450.4(b)(1).)

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl